In the Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 818 ~~804~~ 100.

ROWENA M. CLARKE ET AL.,
vs.
THE CENTRAL R. R. AND BANKING CO. OF GEORGIA ET AL.

Bill, Dependent Bills, &c.

THE CENTRAL R. R. AND BANKING CO. OF GEORGIA
vs.
THE FARMERS LOAN AND TRUST CO. OF NEW YORK ET AL.

Intervention of the Virginia & Alabama Coal Co. and Sloss Iron and Steel Company.

THE FARMERS LOAN AND TRUST CO. OF NEW YORK
vs.
THE CENTRAL R. R. AND BANKING CO. OF GEORGIA ET AL.

Petition of Central Railroad & Banking Company of Georgia et al. for Certiorari from Decree of Circuit Court of Appeals for the Fifth Circuit.

LAWTON & CUNNINGHAM, MARION ERWIN, TURNER, McCLURE & RALSTON, MERCER & MERCER, BUTLER, STILLMAN & HUBBARD, H. B. TOMPKINS, *Solicitors for Petitioners.*

To the Honorable the Judges of the Supreme Court of the United States:

ROWENA M. CLARKE ET AL., *vs.* THE CENTRAL R. R. AND BANKING CO. OF GEORGIA ET AL.	Bill, Dependent Bills, &c.
THE CENTRAL R. R. AND BANKING CO. OF GEORGIA ET AL. *vs.* THE FARMERS LOAN AND TRUST CO. OF NEW YORK ET AL.	Intervention of the Virginia & Alabama Coal Co. and Sloss Iron and Steel Company.
THE FARMERS LOAN AND TRUST CO. OF NEW YORK *vs.* THE CENTRAL R. R. AND BANKING CO. OF GEORGIA ET AL.	Petition for *Certiorari*.

The petition of the Central Railroad & Banking Company of Georgia, and of H. M. Comer and R. Somers Hayes, Receivers of the same, and of The Farmers Loan & Trust Company of New York, Trustee, and of the Central Trust Company of New York, Trustee, respectfully show and aver as follows:

That at the November Term, 1894, of the Circuit Court of Appeals of the United States for the Fifth Circuit, there came on to be heard in that Court the appeal of the Virginia & Alabama Coal Company, suing by intervention for itself and for use of the Sloss Iron and Steel Company, from a decree rendered by the Circuit Court of the United States for the Southern District

of Georgia, in the above stated consolidated causes, and that at said Term, to-wit: on February 25th, 1895, the said Circuit Court of Appeals delivered its opinion in said cause, a certified copy of which is hereto attached as Exhibit A, and entered judgment in accordance therewith reversing the said decree of the Circuit Court, and directing a decree to be entered by the said Circuit Court in accordance with said opinion of the said Circuit Court of Appeals against your petitioners for over $40,000, and petitioners applied for a rehearing in said Court which was refused on June 4th, 1895. Petitioners aver that while in and by the said opinion and judgment said Circuit Court of Appeals has committed manifest error, in a matter involving a considerable amount in the particular intervention in which the judgment is rendered, yet this expresses but a very small part of the results of the judgment as it affects these petitioners, as there are numerous other intervening petitions and proceedings pending in the main cause of similar character amounting to several hundred thousand dollars, seeking to subject the trust property in the hands of the Receivers of the Central Railroad & Banking Company of Georgia to their payment, the proper disposition of which turn upon a correct decision of the same legal question involved in this cause, and a review of which on *certiorari* is sought by this petition.

Your petitioners further show and aver that the Supreme Court of the United States, as they are advised by counsel, has never in any case yet directly passed upon the matter of law making the distinguishing feature of this cause and controlling its correct decision, nor have any of the lower Courts passed upon the same other than the Circuit Court and the Circuit of Appeals through which Courts this cause has passed, and which have each reached a different conclusion.

That the solicitor of your petitioner was present in the Circuit Court of Appeals at the time of the delivery of the opinion aforesaid and requested that the Court would certify the legal proposition involved in the application of the rule in Fosdick's case, to the case of these petitioners as made by the record, to the Supreme Court of the United States, but the said Circuit Court of Appeals through the presiding Circuit Judge declined to so certify the cause and informed petitioners' solicitor that the only method lelt open to petitioners for a review of the cause by the Supreme Court would be an application for *certiorari*.

Your petitioners further show that in the opinion delivered, the Circuit Court of Appeals did not disturb the findings of fact made by the Court below, and but one question or matter of law was decided differently from the judgment and decree of said Circuit Court which was reversed, and that was that the principle commonly known as the rule in Fosdick's case (99 United States, p. 235), is applicable to the facts in the present case. And the Circuit Court of Appeals having placed its decision entirely upon the application of that rule, the sole question which should control this Court in deciding whether the writ of *certiorari* should issue on this petition, is the validity of the decision on the point, and the general importance of the question.

That is to say the Circuit Court of Appeals ruled that where a railroad company leases its railroad lines to another railroad company and debts for supplies and operating expenses are contracted by the lessee company, that upon an abrogation or termination of the lease and the unconditional surrender of the leased road by the lessee, and the appointment of Receivers of the lessor company, that the rule in Fosdick's case applies, and that the debts contracted by the lessee in the operation of the road becomes debts of the lessor and are chargeable upon the Receivers of the lessor company under the rule in Fosdick's case precisely as if it were a receivership of the railroad company contracting the supply debts.

A succinct statement of the facts and issues in the case as presented to the Circuit Court of Appeals is hereto attached as Exhibit B, and made a part of this petition. A printed copy of the transcript of the record filed in the Court of Appeals, together with the briefs of solicitors for both parties, is filed herewith as Exhibit C.

Your petitioners contend that where a railroad company takes a lease of a railroad from another company, and contracts debts for the operation of its railroad system and the *lessee* company is placed in the hands of a Receiver, that the earnings of the receivership and all the property of the lessee company including its *leasehold* interest in the property of the lessor may very properly be chargeable with the supply debts under the rule in Fosdick's case, but that such charge affects only the leasehold interest of the lessee which contracted such indebtedness and in no manner becomes a charge upon the lessor.

And they further contend that where, as in the case at bar, the lease was abrogated and unconditionally surrendered by the lessee, and the road unconditionally withdrawn from the system of the lessee company, and a Receiver was appointed, not for the lessee company but for the lessor, under no recognized rule of law can the debts created by the lessee become chargeable to the lessor or its Receivers. And petitioners aver that in deciding that the lessor is so chargeable the said Circuit Court of Appeals has committed manifest error to the great injury of these petitioners.

Petitioners show to the Court that outside of the importance which attaches to the question in relation to the interests of these petitioners, the question is one of vast importance to the railroad interests of the entire country. The principle now laid down and announced by the Circuit Court of Appeals for the Fifth Circuit as a rule of decision for all the subordinate Courts for so large a portion of the United States is one of far-reaching effect. It is now for the first time laid down as a rule that when a railroad company leases its road to another company it does so with the understanding that upon the abrogation or termination of the lease the entire supply indebtedness and operation expenses of the lessee company which it may through accident or design leave unpaid becomes a charge and lean upon the property of the lessor company. If this rule has been improperly laid down by the Court of Appeals in the case at bar as your petitioners contend, the amount of litigation that will spring out of following or departing from the rule by the various Courts of the country in the vast amount of railroad litigation now before them, and the injustice which will be done to lessor or lessee interest as the case may be, in the forced reorganization of such properties now taking place through the Courts of the country, and the importance of settling so important a question correctly at this juncture when through leases and otherwise the great trunk lines of the country are being evolved, raises the question involved in the case at bar to a degree of general importance which should in the opinion of your petitioners demand from the Supreme Court its review on *certiorari*.

Wherefore petitioners pray that this Honorable Court will grant unto your petitioners the Court's writ of *certiorari* directed to said Circuit Court of Appeals, and requiring that the record of said intervention cause in said Circuit Court of Appeals be

certified to this Court, and that this Honorable Court will then proceed to correct the errors complained of and give to your petitioners such other relief as the nature of their case may require and to the Court may seem appropriate.

Lawton & Cunningham, Marion Erwin
Sols for C. R. R. & B'k'g. Co. of Ga and
Hon Comer & Hayes Receivers of Same
Turner McClure & Ralston, Mercer & Mer
Sols. for Farmers Loan & Trust Co. Trustee.
Butler, Stillman & Hubbard, H. B. Tomp
Sols for Central Trust Co. of New York
Trustee.

SOUTHERN DISTRICT OF GEORGIA—*S. S.*

Before the undersigned personally comes Hugh M. Comer, President of the Central Railroad and Banking Company of Georgia, and one of the Receivers of the same, who, being duly sworn, deposes and says that the facts stated in the foregoing petition for *certiorari* so far as they relate to his own acts and deeds are true, and so far as they relate to the acts and deeds of others he believes the same to be true.

Sworn to and subscribed before me this ..... day of .....,
1895.

EXHIBIT A.

OPINION OF UNITED STATES CIRCUIT COURT OF APPEALS,

FIFTH CIRCUIT—NOVEMBER TERM, 1895.

(Filed February 25, 1895.)

ROWENA M. CLARKE, ET AL., *vs.* THE CENTRAL R. R. AND BANKING CO. OF GEORGIA ET AL.	Bill, Dependent Bills, &c.
THE CENTRAL R. R. AND BANKING CO. OF GEORGIA *vs.* THE FARMERS LOAN AND TRUST CO. OF NEW YORK ET AL.	No. 319.
THE FARMERS LOAN AND TRUST CO. OF NEW YORK *vs.* THE CENTRAL R. R. AND BANKING CO. OF GEORGIA ET AL.	Intervention of the Virginia & Alabama Coal Co. and Sloss Iron and Steel Company.

Appeal from the United States Circuit, Eastern Division, Southern District of Georgia.

Before Pardee and McCormick, Circuit Judges, and Toulmin, District Judge.

STATEMENT OF THE CASE.

TOULMIN, J.

This is a suit brought by intervention for coal furnished by the intervenors, the Virginia and Alabama Coal Company, and the Sloss Iron and Steel Company, for the operation of the Central Railroad and Banking Company, of Georgia, while being operated by the Richmond and Danville Railroad Company. All the coal charged for as furnished before the appointment of receivers for the Central Railroad Company was furnished within less than six months prior to such appointment.

The Central Railroad was leased to the Georgia Pacific Railroad Company; the Georgia Pacific was leased to the Richmond and Danville Railroad Company, the latter company under color of this lease was operating the Central Railroad lines.

On June 1st, 1891, the Central was leased to the Georgia Pacific Railroad Company; and on the same day the Richmond and Danville (to which the Georgia Pacific was already leased) went into the possession of the Central and operated the same till March 4th, 1892, at which date the Receivers of the Central were appointed.

The lease transferred not only the main lines of the Central, but various lines which it controlled by lease and by stock ownership. It further provided that the lessees should take possession of the leased property as a running road, taking such cash and credits as were then due, and on the other hand obligating the lessees to pay the current debts of the lessor company for supplies, etc.

The lease also provided that the lessee should pay the interest on the bonds and debentures of the Central and of the lines upon which the Central had guaranteed interest on bonds, and also dividends on the stock of the Central.

It appears from the agreed statement of facts that the semi-annual interest on the five million dollars of mortgage bonds of the Central was paid in January, 1892, (the order appointing the Receivers being dated March 4th, 1892.) It is also an agreed fact that during the receivership the Central expended for betterments on its railroad lines from the income of the roads during the receivership, a sum much larger than the entire claim of the intervenors.

To set aside the lease, Mrs. Rowena M. Clarke, a stockholder, brought her bill against the Central Railroad, under which a Receiver was appointed March 4th, 1892. The Richmond & Danville and Georgia Pacific Companies disclaimed any rights under the lease, and no issue was raised in relation thereto, such as to require decision as to the validity or invalidity of the lease; and such question has not been determined. Shortly afterwards the Central Railroad filed a dependent bill, under which the same Receivership was continued, and under which it was also extended to the Port Royal & Augusta Railroad, and the Port Royal & Western Carolina Railroad. The Farmers Loan and Trust Company, the trustee for the mortgage bondholders of the Central Railroad afterwards filed its dependent bill in said cases under which the same Receivership was continued. All these cases were afterwards consolidated.

On July 13th, 1891, a contract was made with the Virginia Company for the purchase of a year's supply of coal to operate the Central lines. The contract stipulated for 90 cents per ton of 2,000 pounds, to be delivered on cars at the mines and to be shipped at times and in quantities to suit.

In pursuance of this contract the Virginia Company, between September 16th, 1891, and March 4th, 1892, shipped to the Division Superintendents (Curran, at Macon; Dill, at Savannah, and Epperson, at Augusta,) coal to the amount (per contract price of 90 cents per ton) of $26,607.44. The Sloss Company, under the same contract, by the consent of both parties, supplied coal to the amount of $14,359.38, but at an agreed price of 95 cents a ton. All bills were made out in the name of the Central Company. The price at which the Central Railroad got the coal was 7 or 8 cents per ton less than the market price at that time.

It appears that while much of the coal was used in the operation of the Central Railroad prior to the Receivership, a large part of the coal delivered was in its bins at the time of the appointment of the Receivers, on March 4th, 1892, and went into their possession and was used by them, and that some of the coal was received after that time and likewise went into the possession of the Receivers.

An agreement of counsel is found in the record, as follows: "It is agreed that the coal described in the exhibit to the intervention by amounts and dates of shipment was delivered by

the intervenor to the railroad lines of the Central Railroad & Banking Company of Georgia, which was being operated by the Richmond and Danville Railroad Company till the 4th of March last, at the dates and in the amounts shown by said exhibits." It, however, appears that some of the coal delivered to the Central Railroad was used by several other railroads known as the Port Royal and Augusta, the Port Royal & Eastern Carolina, and the Charlotte, Columbia and Augusta Railroads. The Master's report finds that coal of the Virginia Company, worth $13,735.89, was used prior to the Receivership; that coal worth $6,700.50 was on the bins at the time of the appointment of the Receiver; and that coal worth $6,171.30 was received by the Receiver after his appointment; and that of the coal of the Sloss Company, coal worth $10,320.17 was used prior to the appointment of the Receiver; that coal worth $3,818.00 was on the bins March 4th, 1892, and that coal worth $776 arrived after the appointment of the Receivers. The Circuit Court held the Central Railroad and the Receivers liable only to the extent of the coal which was delivered after March 4th, 1892, (holding them liable at the contract price) and rendered a decree accordingly. From that decree the intervenors appeal.

Toulmin, District Judge, (after stating the case as above) delivered the opinion of the Court:

From what appears in the record we are satisfied that the debts claimed by the intervenors for coal delivered prior to the appointment of the Receivers, were current debts for operating expenses of the Central Railroad lines, made in the ordinary course of business, to be paid out of the current earnings. The coal was purchased in the name of the Central Railroad. It was delivered on its lines, and was furnished for their operation, and, with the exception of a small amount, was used by them. There was evidence that the contract for the purchase of the coal was made by the Central Railroad, and the Master so found. The Circuit Court, however, differed with and overruled the Master in such finding.

In our view of the case it makes no difference whether the contract for the purchase of the coal was made by the Central Railroad or by the Richmond & Danville Railroad. The coal was delivered on the lines of the Central Railroad, and was furnished for and used in their operation. The Richmond & Danville

Railroad Company had the possession of the Central Railroad lines; was operating them, collecting their revenues, and was under the obligation to pay out of their earnings the current expenses and the interest on their bonds. But whether that possession was lawful or otherwise, or whatever the relations between the two railroads may have been, we think that the Central Railroad was liable for the necessary supplies furnished and used for the purpose of keeping its road in successful operation, and carrying on its business as a common carrier. Such debts are preferential and the persons to whom they are due are entitled to have the income of the Receivership used in payment of them as the railroad company would have been bound in equity and good conscience to use it, if no change in the possession of the property had been made.

Farmers Loan and Trust Co. v. Kansas City W. & N. W. R. Co., 53 Fed. Rep., 182.
Burham v. Brown, 111 U. S., 176.
Fosdick v. Schall, 99 U. S., 235.

In this case the equities are especially favorable to the intervenors. For it appears that there was a diversion of the income for the payment of interest on bonds of the Central Railroad in January, 1892, some two months before the Receivers were appointed; and it also appears that the Receiver expended *from the income* for improvements on the railroad property a sum much larger than the claims of the intervenors.

Our opinion is that the Receivers are liable not only for the coal which they received after their appointment from unloaded cars, but that they are equally liable for the coal which was in the bins at the date of their appointment, and which they took possession of and used in the operation of the Central Railroad lines, and that as representatives of the Central Railroad & Banking Company of Georgia they are also liable for the coal delivered to and used by the Central Railroad lines prior to their appointment, and which was then unpaid for.

For that portion of the coal used at Augusta by the three railroads mentioned, as shown by the evidence, the Central Railroad and Receivers are liable, except as to that used by the Charlotte, Columbia & Augusta Railroad. It appears that the other roads mentioned were under the control of the Central Railroad, and were a part of its system. The Charlotte, Columbia & Augusta Railroad was not.

It does not appear that the court in appointing the Receivers made any provision for the payment of the intervenors' claims, but as there is evidence in the record showing that current earnings, before the Receivers were appointed, were diverted to paying interest on the bonded debt, and that after their appointment they made large permanent improvements on the railroad property, the intervenors should be allowed payment of their claims from the *corpus* of the property, should the earnings in the hands of the Receivers be insufficient to pay them.

The intervenors are only allowed the price stipulated for, and which they expected to receive when the coal was delivered, and which is in fact the price claimed in their petition of intervention.

In our opinion the view which the Circuit Court took of this case was an erroneous one, and the decree must be reversed, and the case is remanded to the Circuit Court with instructions to enter a decree in favor of the intervenors for the amounts respectively due them for coal delivered to the lines under the control, and forming a part of the system of the Central Railroad & Banking Company of Georgia, as shown by the evidence in this case, including the coal furnished before the appointment of the Receivers, and that found in the bins at the time of such appointment, and of which the Receivers took possession, as well as the coal delivered to the Receivers after their appointment, the amount due being determined by the contract price; and an order that they recover from the Central Railroad & Banking Company of Georgia and the Receivers of the same such sums thus found to be due. No decree will be entered in favor of the intervenors for the payment of that portion of the coal which was used by the Charlotte, Columbia & Augusta Railroad Company.

A true copy.
Attest.

J. M. McKEE,
Clerk.

EXHIBIT B.

STATEMENT OF THE CASE

AS PRESENTED IN THE CIRCUIT COURT OF APPEALS.

(1.) On June 1st, 1891, the Central Railroad and Banking Company of Georgia, hereinafter designated as the Central Company for brevity, entered into a contract of lease with the Georgia Pacific Railway Company, whereby the lines of railroad owned by the former as well as lines controlled through leases by the former, were leased to the latter for ninety-nine years. The contract also provided that the Georgia Pacific Company should have the control of the voting power of all the stocks owned by the Central Company in certain other subordinate railroad companies.

(2.) The following subordinate railroad lines were at the time of the lease of the Georgia Pacific Company, controlled by the Central Company by lease: The Southwestern Railroad; the Augusta & Savannah Railroad; the Eatonton Branch Railroad; the Mobile & Girard Railroad (printed transcript p. 21).

(3.) The railroad lines of the following subordinate corporations were at the time controlled by the Central Company by virtue of the ownership by the Central Company of all their capital stock: The Savannah & Western Railroad Company; the Montgomery & Eufaula Railway Company; the Savannah & Atlantic Railroad Company (printed transcript, p. 20).

(4.) The Georgia Pacific Railway Company at the time of taking the lease of the Central Company was itself under lease to the Richmond & Danville Railroad Company (printed transcript, p. 1).

(5.) On June 1, 1891, the Richmond & Danville Company went into possession of the railroads previously owned or controlled through lease or stock ownership by the Central Company. This was done under color of the lease to the Georgia Pacific Company (printed transcript, pp. 2 and 243).

(6.) After June 1, 1891, the Central Railroad and Banking Company of Georgia, ceased to operate its railroad lines, and

discharged all of its employes theretofore employed in the operation of said lines of railroad, and in the shops of said company and said Central Company thereafter confined itself exclusively to its banking business in the city of Savannah, and had no other employes except a president and board of directors and attorneys, and such employes as were necessary for its banking business (printed record p. 244).

(7.) It appears from the testimony of J. R. Ryan, vice-president of the Virginia & Alabama Coal Company (printed tran-transcript, pp. 133 and 134) and from the testimony of Thomas Seddon, president of the Sloss Iron & Steel Company (printed transcript, pp. 312 and 313) that just previous to the transaction upon which this suit was brought, a combination in a restraint of trade, and an agreement to create a coal monopoly, was made between the Virginia & Alabama Coal Company, the Sloss Iron & Steel Company, the Corona Coal & Coke Co., the Little Warrior Coal & Coke Company, operating coal mines in the State of Alabama, the Tennessee Coal & Iron Company, operating a coal mine producing the largest output of coal in the state of Tennessee, and with other coal mines in the combination, by reason of geographical situation controlling absolutely the coal supply necessary for the operation of the railroads in Georgia and the Southeast seaboard of the United States.

That said coal mining companies had agreed together that they would not sell the coal produced at their respective mines except to the particular railroad companies allotted to them as their special customers under the agreement between themselves, and that thus competition between the mines would be prevented, and that thus they could force the railroads to pay their own price for coal furnished.

That under the terms of the combination it was agreed that the Richmond & Danville Railroad Company should not be sold any coal by the Virginia & Alabama Coal Company, and should be supplied only by the Sloss Iron & Steel Company. That it was the purpose of the combination to corner the coal supply of the railroads of the Southeast seaboard, and in the language of Mr. Ryan, president of the Virginia & Alabama Coal Company, to "squeeze" them out of a large advance in the price (printed transcript, pp. 133, 134, 312, 313).

(8.) That in pursuance of the combination the Sloss Iron & Steel Company did advance the price of coal to the Rich-

mond & Danville Railroad Company from $1.05 to $1.12 per ton (printed transcript, p. 313).

That on or about July 1, 1891, General Manager Green of the Richmond & Danville Railroad Company proposed to the Virginia & Alabama Coal Company to enter into a contract for a supply of coal for the operation of the Central lines of which the Richmond & Danville were then in possession (printed transcript, p. 133). At that time the Virginia & Alabama Coal Company, and Sloss Iron & Steel Company, both knew that the Central Company was not operating its own lines, but that they were being operated by the Richmond & Danville Railroad Company under color of the lease to the Georgia Pacific Company (printed transcript, pp. 135, 307).

In order to cover up from the knowledge of the other members of the combination the fact that his company was selling to the Richmond & Danville Company and thus to obtain the benefits of the combination, and at the same time violate its terms, Vice-President Ryan, of the Virginia & Alabama Coal Company, visited the headquarters of the Richmond & Danville Company, in Washington, D. C., and there, with full notice of the real facts, accepted the statement of Joseph P. Minetree, purchasing agent of the Richmond & Danville Railroad Company that he, Minetree, was purchasing agent of the "Central Railroad" also, (printed transcript, p. 128) as equivalent to an assertion that he was purchasing agent of the Central Railroad and Banking Company of Georgia, and there entered into the contract of July 13, 1891, (printed transcript, p. 48) for the furnishing of 275,000 tons of coal at 90 cents per ton delivered on cars at the mines to the "Central Railroad and Banking Company of Georgia."

(The contract, however, showing on its face that Minetree was acting in making it as purchasing agent of the Richmond & Danville Railroad Company (printed transcript, p. 48). Minetree never was an employe of the Central Railroad and Banking Company (printed transcript, pp. 307, 308, 245).

(9.) Afterwards the Virginia & Alabama Coal Company allowed the Sloss Iron & Steel Company to furnish a portion of the coal under the contract. The two coal companies continued to supply coal under the contract, delivering it "to the Rich-

mond & Danville Company" on cars at the mines until March 4, 1892 (printed transcript, p. 17).

(10.) On March 4, 1892, the Central Railroad and Banking Company was put into the hands of Receivers on a stockholders bill brought by one of its stockholders against it and the Georgia Pacific Railway Company and the Richmond & Danville Railroad Company, in which it was set up that there was no power in the charter of the Central Railroad and Banking Company authorizing it to lease its lines, and that the lease was *ultra vires*, and for this and other reasons wholly void (printed transcript, p. 2). The Georgia Pacific Company and the Richmond & Danville Company at the hearings on rule *nisi* disclaimed all right of possession under the lease to any of the Central's properties.

(11.) While the Central Company was still in the hands of the Receivers appointed under the stockholders bill, the corporation filed a dependent bill, setting up that by reason of the diversion of its earnings by the Richmond & Danville Company during its possession, the Central Company had been forced to make default in the payment of its bonds, and declaring its inability to take possession and operate the properties. The Farmers Loan and Trust Company of New York, Trustee for the mortgagee bondholders of the Central Company, then filed its dependent bill to foreclose a five million dollar mortgage on the principal railroad of the Central Company (printed transcript, p. 15). The Central Trust Company of New York, Trustee for stockholders, afterward filed a bill to foreclose a second mortgage on the same property, given to secure thirteen million dollars of bonds.

(12.) The coal which was delivered by the coal companies to the Richmond & Danville Company at the mines, was by the latter brought into Georgia over the lines it controlled, and for almost the entire distance over lines controlled through the Central's lease (printed transcript, pp. 308, 309).

(13.) The coal shipped from the mines was in the main consigned to Superintendents of the Richmond & Danville Company at points on the lines of the Central Company, but a considerable portion of it was distributed to railroads belonging entirely to the Richmond & Danville Company, and which had never belonged to the Central Company or connected with its

system, and even where unloaded into bins which were controlled by the Richmond & Danville Company through the Central lease, it was the practice of the Richmond & Danville Company to coal its engines running on its original roads as well, out of the same bins (printed transcript, pp. 230, 231).

(14.) Under the terms of the lease to the Georgia Pacific Company, the Richmond & Danville Railroad Company went into possession of the Central Railroad on June 1, 1891, taking it as a "going concern," all supplies of the Central Company, coal in the bins and other material being turned over to the lessee (printed transcript, pp. 29, 37).

(15.) During the possession of the Central Company's lines by the Richmond & Danville Company, the intervenors furnished under the contract of July 13, 1891, large quantities of coal, considerable quantities of which were paid for some $80,000 by the Richmond & Danville Company before March 4, 1892 (printed transcript, p. 136; also pp. 54 and 55). Other coal companies also furnished coal during that period to the Central lines, being operated by the Richmond & Danville Company. How much was so furnished or how much ofit was paid for by the Richmond & Danville Company, is not in proof.

(16.) Of the coal delivered by the Virginia & Alabama Coal Company subsequent to March 4, 1892, the time of the appointment of the Receivers of the Central Railroad and Banking Company, the following amounts were taken from the cars and used directly or indirectly by said Receivers:

6,857.75 tons at 90 cents..... $6,171.98

The court has given the Virginia & Alabama Coal Company a judgment for this sum against said Receivers, which is not excepted to (printed transcript, p. 357).

It appears from the record that there was a break in the price of coal after the contract of June 13, 1891, and that the price went down as low as 80 cents per ton at the mines (printed transcript, p. 313), and the court in fixing the compensation allowed intervenors, at the price named in that contract, for the coal delivered after March 4, 1892, favored the intervenors rather that the receivers.

(17.) Of the coal delivered by the Sloss Iron and Steel Company, subsequent to March 4, 1892, the time of the appoint-

ment of the Receivers of the Central Railroad and Banking Company, the following amounts were taken from the cars and used directly or indirectly by said Receivers:

816.85 tons at 95 cents..... $775.00

The court has given the Sloss Iron and Steel Company a judgment for this sum against said Receivers, which is not excepted to (printed transcript, p. 358).

(18.) Between the date of the contract of July 13, 1891, and March 4, 1892, the date of the appointment of the Receivers of the Central Railroad and Banking Company, besides the large amount of coal furnished which was paid for by the Richmond & Danville Company, the Virginia & Alabama Coal Company and the Sloss Iron and Steel Company furnished to the Richmond & Danville Company a large quantity of coal which was distributed for use at points along the Central Railroad and leased lines as well as along the lines of other railroads operated by the Richmond & Danville Company (such as the Charlotte, Columbia & Augusta Railroad) which never had been in the Central's system. The amount of coal so shipped and the lines along which the same was unloaded, is shown for the Virginia & Alabama Coal Company, on the Printed Record at page 114, the aggregate being 22,654.80 tons, and for the Sloss Iron and Steel Company at page 296, the aggregate being 11,127.15 tons, making the total shipped during said period for both companies, 33,781.95 tons.

(19.) All the coal unloaded along the Central Railroad and leased lines during that period was not, however, used on those lines, but the locomotives on other lines operated by the Richmond & Danville Company were fed from the coal bins on the Central's lines. The amount of coal so used from the coal bin at Augusta, Georgia, is shown in the Printed Record at page 115, and amounted to 9,752 tons.

(20.) It is in proof that on March 4, 1892, at the time of the appointment of Receivers for the Central Railroad and Banking Company, the following amounts of coal were in the bins:

In bins on Central Railroad and leased lines..... 8,947 tons
In bins on Savannah & Western Railroad..... 4,925 tons

Total..... 13,872 tons
(Printed Record, pp. 118, 349, 243, 87).

It is contended by the intervenors that this coal represents in part the 33,781.95 tons of unpaid for coal delivered by them to the Richmond & Danville Company prior to March 4, 1892, and they contend that if they are not entitled to charge against the Central Railroad and Banking Company and its Receivers the whole of 33,781.95 tons of coal delivered prior to the receivership, yet that they had a special equity in the 13,872 tons of coal in the bins, and they have attempted to fix the amounts of the 13,872 tons which are properly to be apportioned to them respectively.

It is in proof that coal furnished by the intervenor was put in the bins during that period to the value of $80,000, which was paid for (printed transcript, pp. 136, 54, 55); also that other coal companies had during the same period furnished coal which had been put in the bins, among which were the Corona Coal and Coke Company and the Little Warrior Coal Company. There is no proof in this case as to what part of the coal furnished by the two companies last mentioned was paid for, or whether anything is actually due them. The only proof submitted being the fact that the two companies had filed similar interventions to those filed by these intervenors, claiming certain balances due them for coal furnished during that period, and the amount of coal so furnished being in issue and still pending (Printed Record, p. 18). Nevertheless intervenors rely upon a contract (Printed Record, p. 228) entered into between said four coal companies *inter sese*, after suit brought, and to which contract the Central Company and its Receivers were not a party, and which was admitted in evidence over our objection (Printed Record, p. 154) as sufficient evidence to establish the claim of the four coal companies mentioned to the entire 13,872 tons of coal found in the bins on March 4, 1892, and to apportion the value of it among the four companies in accordance with apportionment agreed upon among themselves. They neither took into account the fact that the coal in the bins as a residium of unused coal represented contributions not alone from unpaid for coal, but also from coal bought from all sources and paid for, and as well also the coal in the bins turned over by the Central Company to the Richmond & Danville Company on July 1, 1891, the railroad with all coal and other supplies having been turned over a that time as a "running road" (Printed Record, pp. 29, 37.

(21.) While the contract price of the coal at the mines was for the Virginia & Alabama Coal Company 90 cents per ton, and for the Sloss Iron and Steel Company 95 cents per ton, it was shown in evidence that the value of the coal at the several points of delivery varied from $1.23 to $3.38 per ton, but that the difference between the price of the coal at the mines and the coal at the bins is made up of freight charges for the haul of the coal over the Central's lines (Printed Record, pp. 309, 316).

(22.) The intervenors in their intervention taking advantage of the fact that the main cause was a litigation between the Central Railroad and Banking Company and Richmond & Danville Company, prayed a judgment against the last mentioned company as well as against the Central Railroad and Banking Company and its Receivers. The court below did not think that it had jurisdiction of the Richmond & Danville Company for the purpose of such a judgment, which was not germane to the objects of the original bill upon which the Richmond & Danville had been brought into court, and the prayer of such judgment was denied.

(23.) It is not true, as petitioners are advised, that it appears from the record that there was a diversion of the income from the earnings of the leased railroad to the payment of the interest on the bonds of the Central R. R. & B. Co. of Georgia in January, 1892, within the meaning of the rule in Fosdick's case. What the record discloses is that the lessee had transferred to it, under the lease, not only the road, but the income from several million dollars of stocks and bonds owned by the Central Company, which was more than sufficient to pay the interest on its mortgage debt (printed transcript, pp. 23, 29). And that the lessee agreed to pay, as part of the rental, the interest on the mortgage indebtedness of the Central Company (printed transcript, p. 34) and that the interest on the mortgage debt falling due in January, 1892, was paid. This is the full extent of the stipulation in the record on this point (printed transcript, p. 15, clause 14). The contention of the Central Company, as made by the record, is that the income of the railroad during that period was appropriated by the Danville Company and that issue is pending elsewhere (printed transcript, p. 10).

No. 848. 404 100.

JAN 13 1896

JAMES H. McKENNEY, CLERK.

In the Supreme Court of the United States.

Brief of Erwin & Tompkins for Appellees - Petitioners

OCTOBER TERM, 1895.

No. 848

Filed Jan. 13, 1896.

ROWENA M. CLARKE ET AL.,

vs.

THE CENTRAL R. R. AND BANKING CO. OF GEORGIA ET AL.

Bill, Dependent Bills, &c.

THE CENTRAL R. R. AND BANKING CO. OF GEORGIA

vs.

THE FARMERS LOAN AND TRUST CO. OF NEW YORK ET AL.

Intervention of the Virginia & Alabama Coal Co. and Sloss Iron and Steel Company.

THE FARMERS LOAN AND TRUST CO. OF NEW YORK

vs.

THE CENTRAL R. R. AND BANKING CO. OF GEORGIA ET AL.

Petition of Central Railroad & Banking Company of Georgia et al. for Certiorari from Decree of Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF

LAWTON & CUNNINGHAM, MARION ERWIN, TURNER, MCCLURE & RALSTON, MERCER & MERCER, BUTLER, STILLMAN & HUBBARD, H. B. TOMPKINS, *Solicitors for Petitioners.*

IN THE SUPREME COURT OF THE UNITED STATES.

ROWENA M. CLARKE ET AL., *vs.* THE CENTRAL R. R. AND BANKING CO. OF GEORGIA ET AL.	Bill, Dependent Bills, &c.
THE CENTRAL R. R. AND BANKING CO. OF GEORGIA ET AL. *vs.* THE FARMERS LOAN AND TRUST CO. OF NEW YORK ET AL.	Intervention of the Virginia & Alabama Coal Co. and Sloss Iron and Steel Company.
THE FARMERS LOAN AND TRUST CO. OF NEW YORK *vs.* THE CENTRAL R. R. AND BANKING CO. OF GEORGIA ET AL.	Petition for *Certiorari*.

BRIEF OF SOLICITORS FOR PETITIONERS.

Statement of the Case.

(1.) On June 1, 1891, the Central Railroad and Banking Company of Georgia, (hereinafter designated as the Central Company, for brevity) a corporation under the laws of Georgia, owning and operating a line of railroad from Atlanta, Georgia, to Savannah, Georgia, executed a lease for ninety-nine years, of said railroad, to the Georgia Pacific Railway Company, a corporation organized under the laws of Georgia, and also of certain other lines

of railroad which had been leased by the Central Company, and also covenanted to give the Georgia Pacific Company the control of certain other lines of road which the Central Company controlled by stock ownership.

(2.) Previous to June 1, 1891, the Georgia Pacific Railroad Company had leased its own line of railroad extending from Atlanta, Georgia, to Birmingham, Alabama, to the Richmond & Danville Railroad Company, a corporation organized under the laws of Virginia, and which owned or controlled by leases a line of railroad from Atlanta to Washington, D. C.

(3.) On June 1, 1891, the Richmond & Danville Railroad Company (hereinafter designated as the Danville Company, for brevity) went into possession of the railroad lines of the system of the Central Railroad and Banking Company of Georgia, referred to in paragraph 1 and operated the same until March 4, 1892.

(4.) On March 4, 1892, Mrs. Rowena M. Clark, a citizen of the State of South Carolina, and a stockholder of the Central Railroad and Banking Company of Georgia, filed her bill on behalf of herself and other stockholders, in the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia, against the Central Railroad and Banking Company of Georgia, the Georgia Pacific Railroad Company, the Richmond & Danville Railroad Company, and other defendants, all citizens of States other than South Carolina. The bill charged among other things that the possession of the Central Company's lines by the Danville Company was without color of right that the lease to the Georgia Pacific Company was contrary to the laws of Georgia and *ultra vires* the Central Company's charter, and the then existing board of directors it was charged had been illegally elected, and had wrongfully abandoned said property to the Danville Company.

It sought a cancellation of the lease, the appointment of a Receiver to take possession of the railroad lines of the Central Company, which were charged to be in the unauthorized control and possession of the Danville Company, and to hold the same until a new board of directors could be elected, into whose hands it could be delivered.

(5.) On March 4, 1892, a temporary Receiver was appointed as prayed.

On the hearing, March 24, 1892, on the rule *nisi* for injunction and Receiver, on the above bill, the Danville Company disclaimed

all right to hold possession or operate the railroad lines of the Central Company, which lines it had been operating during the nine preceding months.

The Georgia Pacific also at said hearing disclaimed any right of possession under the lease, stating that the signing of said contract of lease by its officers was unauthorized.

The Central Railroad and Banking Company, at the hearing, filed an answer submitting to the jurisdiction of the Court and stating that it had, up to that time, continued in good faith to assert the legality and validity of said lease, but that in view of the disclaimers filed by said Companies, "the defendant submits to the jurisdiction of the Court as to the course it shall pursue in reference to the said contract of lease, and prays its direction and instruction in the premises."

(6.) At the hearing on rule *nisi*, the old directors of the Central Company were appointed by the Court Receivers of that Company, and provision was made for the calling of a new election of directors under the Company's charter. The Receivers took possession of the railroad as they found it, and among other things they took possession of whatever coal they found in the bins.

The Danville Company, however, took all freight earnings up to the receivership made by it, and settled its own traffic balances. The orders of the Court not authorizing the Receivers to take possession of any property or earnings of the Danville Company, nor anything more than the railroads and equipment of the Central system.

(7.) The new Directors of the Central Company were elected, but instead of applying to the Court for the properties, they, on July 4, 1892, caused the Central Company to file in the Court a dependent bill against the Farmers Loan and Trust Company of New York, trustee, and other creditors, in which it set up that, by reason of the fact that its revenues from June 1, 1891, to March 4, 1892, had been diverted and appropriated by the Danville Company, and other causes, it was unable to meet its maturing obligations, and had defaulted on July 1, 1892, on the semi-annual interest due on $5,000,000 mortgage bonds, dated October 1, 1872, for which the Farmers Loan and Trust Company of New York was trustee, and that for these reasons the Directors were unable to assume the management of the property, and requesting the Court by proper process to call upon its creditors to come into Court, and that the

Court would administer the property for the benefit of all interested. On the rule *nisi* on this bill the Farmers Loan and Trust Company appeared and consented to a continuance of the receivership under it, as did likewise other parties who appeared.

(8.) The semi-annual interest due the Farmers Loan and Trust Company on mortgage of July 1, 1872, was duly paid in January, 1892, and default on the next semi-annual interest on said bonds was made July 1, 1892, which gave the Trustee the right to foreclose the mortgage six months thereafter.

(9.) On January 23, 1893, the Farmers Loan and Trust Company of New York, Trustee for bondholders, filed its dependent bill in said Court for the foreclosure of the five million dollar mortgage on the main stem of the Central Railroad, and to have a Receiver appointed to collect and apply to the said debt the income of the road which was likewise pledged in said mortgage. On January 23, 1893, the Court extended the receivership to that bill.

(10.) The Georgia Pacific and Richmond & Danville Company took under color of the lease, during the nine months of its operations, the income from several million dollars of stocks and bonds owned by the Central Company, which was more than sufficient to pay the interest on its mortgage debt (printed transcript, pp. 23 and 29). And the Lessee agreed to pay as part of the rental the interest on the mortgage indebtedness of the Central (printed transcript, p. 34).

But the record does not disclose whether the interest on the mortgage debt falling due January 1, 1892, was paid out of the income from stocks and bonds of the Central Company or out of the earnings made by the Danville while operating the Central lines. The contention of the Central Company as made by the record is that the income of the railroad during that period was appropriated by the Danville Company, and that issue is pending elsewhere (printed transcript, p. 10).

(11.) Afterward the Central Trust Company of New York, Trustee for second mortgage bondholders of the Central Company, filed their bill to foreclose a thirteen million dollar mortgage on the same property.

(12.) Since the receivership the Receivers of the Central Company have expended for betterments on its railroad lines, out of the earnings of the receivership, a sum much larger than the entire claim of the Intervenors.

(13.) The case at issue was made by the filing of Interventions in the main cause by the Virginia & Alabama Coal Company and Sloss Iron & Steel Company, afterward consolidated and conducted by the Virginia & Alabama Coal Company suing for itself and Steel Company. The suit is for the value of coal furnished by the Intervenors during the nine months operation by the Danville Company of the Central's lines.

(14.) The contract under which the coal was shipped by Intervenors was made between the coal companies on one side and Joseph P. Minetree on the other on July 13, 1892, something over a month after the Danville Company went into possession. The Circuit Court for the Southern District of Georgia found that Minetree was never the agent of the Central Company, but was at the time the agent of the Danville Company.

The Circuit Court of Appeals in its opinion make no finding on this point, but say it is immaterial whether the contract was made with the Central Company or Danville Company.

(15.) The Circuit Court of the Southern District of Georgia found that of the coal shipped by the Intervenors during the Danville Company's operation, (1) some of it arrived and was unloaded and used by the Receivers after their appointment, and for this the Receivers are liable to the Intervenors. (2) That some of it had been commingled with other coal in the bins, and that there was no sufficient evidence showing what part, if any, of the coal in the bins, was that furnished by the Intervenors, and for that reason refused to give intervenors a judgment for the amount claimed as their coal in the bins. (3) That as to the coal furnished to the Danville Company and consumed by it during its operation of the Central's lines, that this constituted a debt of the Danville Company, and the claim against it for keeping its system a going concern, and was not a debt of the lessor company, nor did it constitute a preferential claim against the Receivers of the lessor company.

(16.) The Circuit Court of Appeals reversed the decree of the Circuit Court on the last two propositions. Stating in its opinion that it was immaterial whether the lease be valid or invalid or whether the contract for purchasing the coal was made by the Central Company or by the Danville Company, and put its opinion wholly upon the principle enunciated that when one railroad company operates the lines of another railroad company by lease, valid

or invalid, creating debts for operating expenses and pays rental to the lessor company, which is applied to the interest on the bonded debt of the lessor company, that upon a dissolution and surrender of the lease that the supplies furnished to the lessee constitute a charge upon the railroad of the lessor preferential to the lien of the mortgage on the lessors' road.

(17.) This petition for *certiorari* to review the judgment of the Circuit Court of Appeals is brought by the representatives of the bondholders of the Central Company and by the Central Company and its Receivers, representing its stockholders and all classes of its creditors interested against the diversion of its assets to the payment of the indebtedness created by the Danville Company.

LAW OF THE CASE.

QUESTION AT ISSUE ON PETITION FOR CERTIORARI.

(1.) Since the Circuit Court of appeals placed its decision wholly upon the ground that supplies furnished to a lessee company, operating a leased railroad constituted a preferential claim against the lessor company's railroad, when the rental paid is applied to interest on the bonded debt of the lessor company, the allowance of the petition for *certiorari* to review the decree of the Circuit Court of Appeals, ought to depend solely upon the question as to whether the rule there enunciated is the law, and if not the law, whether the petition raises a question of sufficient general importance to call for its correction.

It is true there were other questions in the case, such as whether the Intervenors had sufficiently identified any part of the coal found in the bins at the time of the appointment of Receivers of the Central Company, and the want of power in Joseph P. Minetree, the purchasing agent of the Danville Company, to make a contract binding on the Central Company, and the question as to whether there be any statutory lien in favor of Intervenors, on all of which points the finding of the Circuit Court had been in favor of these petitioners; but the necessity of determining them in the Circuit Court of Appeals was cut off by the view taken by that Court as to the application of the rule in Fosdick v. Schall to this case, and therefore that is the sole question on the merits which it is necessary to consider on this petition.

THE RULE IN FOSDICK'S CASE NOT APPLICABLE.

(2.) An analysis of the case of Fosdick v. Schall, 99 U. S., 235, and the subsequent application in similar cases of the principles involved, shows that the rule announced in that case is not a rule whereby a furnisher of supplies is given any right in the railroad operated, or lien on the same; but the rule grows out of the fact that the earnings of a railroad company made from the consumption of supplies furnished are impressed with a trust in the hands

of the officers of the *company receiving the earnings* in favor of the furnisher of supplies and certain special classes of creditors, for their payment first and before the payment of the interest on the bonded debt *of the railroad company operating the road.* And where there has been a diversion of the fund in favor of such bondholders, and there is a contest between them and such special creditors over the assets of such operating company, equity compensates such special creditors for such diversion. But where the railroad system of the operating company includes leased lines, in no case has the Supreme Court of the United States yet held that the preferential equity should be extended beyond the leasehold interest of the operating company in the leased line.

Instead of making supplies and the operating expenses a charge upon the lessor and *corpus* of the leased property, it has been the invariable rule, where a railroad system has been placed in the hands of a Receiver, and the Receiver elects to discontinue the payment *of rent*, to allow the lessor to withdraw its road from the receivership. This was the rule announced by the Court in the Wabash case, although there was some four million dollars of such preferential claims outstanding, and created by the operation of the system of the lessee company.

Quincy, etc. Company vs. Humphries, 145 U. S., 82.
U. S. Trust Co. vs. Wabash Ry., 150 U. S., 287.

Instead of saddling the debts of the lessee company for keeping its system a going concern, the rule is that if a Receiver elects to retain possession of the leased road he must adopt the lease and pay the rental.

Idem.

The Circuit Court of Appeals appears to have overlooked the fact that Intervenor's claim is a debt of the Danville Company, and

if that company be solvent is collectable from it; if that company be insolvent, it becomes a preferential claim against that company, being for supplies for keeping the Danville system a going concern.

Clyde vs. Richmond & Danville Co., 56 F. R., 539.

(This case is cited only to the point that such supplies are to be considered as furnished to keep the whole system of the operating company a "going concern.")

NO DIVERSION.

(3). There has been no diversion of the earnings in the case at bar within the meaning of the rule in Fosdick vs. Schall. That rule was never intended to militate against the principle that the vigilant creditor is entitled to the fruits of his diligence. And where payment has been made to one of several creditors, standing on the same footing, it does not undertake to undo such act of the parties. The lien for rental is one of high statutory dignity in Georgia, (Code, Sec. 1977), and the claim of lessors for accrued rentals has heretofore been recognized by the courts as belonging in the class of preferential claims.

Quincy, etc. Company vs. Humphries, 145 U. S., 82.

Whether the lessee company under the terms of the lease applied the income from the stocks and bonds in other companies turned over under the lease to pay the interest on the mortgage debt, (which was amply sufficient for that purpose), or whether it took a part of the earnings made by it on the Central lines, makes no material difference; in either case, in fact, and by the terms of the lease, it was but a payment of agreed rental. There was no privity between the mortgage bondholders of the Central Company

and the Danville Company and its supply creditors. It was not as was the case of Fosdick vs. Schall, a case where the Central Company's mortgage bondholders and other creditors stood silently by and allowed *their debtor* to accumulate large indebtedness for operating expenses. They did not have the right to interfere in the affairs of the lessee company so long as the rental was paid. The case is therefore not within the reason of the rule in Fosdick's case.

Neither was there any diversion of earnings during the Danville Company's operation, to betterments. The record shows only the application of income earned by the Central Company's receivers to betterments. Supply creditors, whose supplies were consumed by the Danville Company, can have no equity in the earnings of the Central made by the receivers with other supplies.

PAYMENT FOR SUPPLIES NOT A PUBLIC DUTY.

(4). It was urged in the Court below that because the Courts have uniformly held that a railroad company which has leased out its railroad is still liable for *torts* committed by the lessee in the operation of the road, on the ground that the safe operation of the road was a public duty imposed by its charter, that therefore payment of necessary supplies for operation of a road must be also a public duty.

To this we reply: Every corporation, like every natural person, ought to pay its debts; but this is a private duty for a breach of which the public or a member of it has no cause of action. The distinction between the duties to the public and the private contract duties of a railroad company is clearly indicated in the following extract from Redfield Law of Railway, 616, quoted with approval by the Supreme Court of Georgia:

"But even where such contracts (railroad leases), have been made by permission of the Legislature, it has been held in this country that the company leasing itself does not thereby escape all responsibility to the public. But that the public generally may still look to the original company as to all its obligations and duties *which grow out of its relations to the public and are created by the charter* and the general laws of the State, and are independent of contract or privity between the party injured and the railway."

Singleton vs. Southwestern R. R., 70 Ga., 470.

LESSEE NOT AN AGENT OF THE LESSOR.

(5). While under a lease, whether valid or invalid, the lessee is the agency through which the lessor performs its charter obligations to the public, yet this by no means creates the lessee the agent of the lessor to make contracts with private individuals for supplies used by the lessee in the operation of a railroad. If the lease be lawful the lessee contracts on its own account. If the lease be *ultra vires*, then it is wholly void, and cannot confer upon the lessee the character of an agent for the lessor capable of binding it by contract.

Transportation Co. vs. Pullman Co., 139 U. S., 24.

GENERAL IMPORTANCE OF THE QUESTION.

(6). The question disposed of by the Circuit Court of Appeals in this case, not only carries with it the forty thousand dollars involved in these interventions, but also several hundred thousand dollars on similar interventions filed in the main cause, and therefore from a pecuniary standpoint is of great importance to the parties to the present suit. But the importance of the question transcends even the interests of the parties to the present litigation.

The question which makes the distinguishing feature of this case has not been directly passed upon yet by any other of the United States Courts save the Circuit Court and Circuit Court of Appeals through which this cause has passed, and they both have reached different conclusions.

The fact, however, that the Circuit Court of Appeals for the Fifth Circuit has made so extensive an enlargement of the application of the rule in Fosdick vs. Schall, as that it charges a lessor company with all the operating expenses of a leased road which by accident or design the lessee company may leave unpaid, will if that extension of the rule be fallacious, give rise to an untold amount of litigation in the various subordinate Courts, and by reason of the vast amount of railroad property now being administered in the Courts, the weight of such erroneous decision in the forced reorganization of such systems now going on is destructive of the rights of all lessors.

Besides the doctrine announced by making the lessor companies in effect the insurers of the solvency of the lessee companies, practically raises an obstruction in the way of the formation through the lease system of the great trunk lines, the necessity for which has been demonstrated in the rapid expansion of our interstate commerce.

All these considerations raise the question to such a degree of general importance as demands a speedy settlement by the Court of last resort.

OTHER POINTS.

(7). It is not deemed necessary to cover in this brief other points of law than those upon which the Circuit Court of Appeals rested its decision, because if those be erroneous the writ ought to issue that the case may be reviewed, but we have filed with the record from the Circuit Court of Appeals the briefs of solicitors on both sides used in that Court.

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